In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 404

UNITED STATES OF AMERICA, APPELLANT

v.

PABST BREWING COMPANY, SCHENLEY INDUSTRIES, INC., AND THE VAL CORPORATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

REPLY BRIEF FOR THE UNITED STATES

On the basic issue whether the sale of beer in Wisconsin constitutes a relevant market under Section 7 of the Clayton Act, Pabst in its brief contends that there is in fact no issue of standards, but a simple failure of proof by the government (*e.g.*, Br. 31–33). Since this contention goes to the heart of the case, we deem it appropriate to reply. But, before doing so, we wish to correct the impression created by Pabst's brief that the government before trial altered its intention to call witnesses, and introduce certain

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documentary evidence, relative to the issue of the proper definition of the market.

It is quite true that the government originally planned to introduce extensive testimony by industry witnesses—brewers, maltsters, and distributors—and then decided not to. But this was not, as Pabst implies, evidence going to the definition of the relevant market. Rather, it was evidence—largely superfluous in a case of this kind under the principles of *United States* v. *Philadelphia National Bank,* 374 U.S. 321—relating to the competitive effects of the merger.[1] All the evidence the government deemed pertinent to the market issues of this case was introduced;[2] there was no holding back.

As mentioned at the outset, Pabst does not purport to be in disagreement with the government's market standard, the nub of which is that the sales of a product within a limited geographical area delineate an appropriate market so long as the producers who sell there are shielded from effective competition from those who do not. Yet Pabst attaches apparently controlling significance to facts which, under the government's standards, are at most neutral. One is that much of the beer produced in Wisconsin is sold elsewhere—a fact in no wise inconsistent with our theory that those brewers who have cultivated a

[1] The scheduled witnesses were to testify concerning the cancellation of beer distributorships (R. 80–86), sales losses sustained by competitors of Pabst and Blatz (R. 86–94), and losses by suppliers of malt to Blatz (R. 58–59, 94).

[2] In some instances, in the form of tabular summaries of or excerpts from documents in the government's possession.

market for their product among Wisconsin consumers have a substantial competitive advantage over those who have not. Another is that Pabst and Blatz themselves sold the greater part of their beer in States other than Wisconsin. But, again, this is a factor having little if any relevance under the standard that we have proposed and that Pabst purports to accept. The fact that Pabst and Blatz have—as we argue—a distinct market for their beer in Wisconsin surely does not preclude their having other markets elsewhere, and from the standpoint of protecting competition in Wisconsin it does not matter how much beer Blatz and Pabst sell elsewhere.

Finally, Pabst emphasizes that a substantial portion of the beer consumed in Wisconsin originates in other States. We have, of course, never suggested that the Wisconsin beer market may properly be viewed as limited to the brewers who have production facilities in the State. All brewers who sell there must be included. And our computation of market shares reflects the Wisconsin sales of all such brewers wherever located. The question is whether other producers (wherever their production facilities may be located) who do *not* sell any beer in Wisconsin should also be included. We think not, because we believe, and the record shows, that such other sellers must overcome significant economic barriers to market their beer in Wisconsin. These barriers are not absolute; but they give the existing sellers a significant margin within which they have freedom to set prices without taking account of the reactions of the outside sellers—whether or not the latter may be potential competitors. We

submit that the presence of such barriers defines an economically realistic—and legally sufficient—market, and on this most basic point we appear to be at issue with Pabst and with the district court.

Turning to the particulars of the evidence, Pabst argues that the record is barren of proof of any barriers or rigidities that make it difficult for a brewer (not previously active there) to sell in Wisconsin. It is true that there is no explicit testimony by industry witnesses or experts as to the existence of such barriers. But we think such evidence is not indispensable—and here again we are at issue with appellee upon a fundamental question of standards under Section 7. It is enough, in our view, if the evidence submitted compels the inference that the requisite barriers exist, and that is the case here.

There is, for example, ample (and, at this stage, unrebutted) [3] evidence of the importance of consumer preference, or "brand differentiation," in the marketing of beer. We review this evidence at length in our opening brief (pp. 39–42), citing to the record, and we are at a loss to understand Pabst's flat assertions (Br. 51, 53, n. 33) that no such evidence exists. The undisputed facts show that, far from being a fungible product, beer is sold on a brand basis. A producer cannot hope to be successful if he does not advertise and promote his brand (or brands) and

[3] The district court dismissed the complaint at the close of the government's case. Our basic challenge to the district court's decision is its failure to draw inferences as to the existence of a relevant market in the State of Wisconsin which we believe are compelled by the government's unrebutted evidence.

enlist a team of vigorous and effective wholesale distributors. Obviously, therefore, he cannot hope to penetrate a new area without a substantial investment in such promotional efforts to overcome loyalties to existing brands.

There is also substantial evidence that compels the conclusion that heavy transportation costs are entailed in shipping beer over long distances. Why else would Blatz's sales of beer in California increase dramatically, as they did,[4] when in 1959 Pabst began substantial brewing of Blatz beer in Pabst's California brewery? Before the merger, Blatz's sales were heavily concentrated in Wisconsin, where its single brewery was located. After the merger, as Pabst points out (Br. 13), a smaller proportion of its sales were made in Wisconsin, no doubt because its beer was now being brewed in Pabst's more widely dispersed breweries and could therefore be marketed more widely.

Pabst emphasizes that the production of beer in Wisconsin far exceeded consumption, and that numerous breweries were located within the same distance of Wisconsin as existing importers like Hamm and Anheuser-Busch (see R. 403–405). Far more significant, however, is the fact that, in the face of these conditions, the identity and market shares of the existing sellers in Wisconsin, including such importers, remained so stable throughout the six-year period covered by the record. There were no sig-

[4] From about 29,000 barrels in 1958 (R. 194) to about 81,000 barrels in 1959 (R. 195), to about 130,000 barrels in 1961 (R. 197)—an overall increase of some 450 percent after Pabst began brewing Blatz beer in its California plant (R. 251–252).

nificant exits of existing sellers or entries of new ones. And while there was—inevitably—some fluctuation in market shares (though Pabst exaggerates the amount),[5] it was far less than one would expect if the market for beer were, as Pabst claims, truly national so that the market position of any brewer in a particular State at a particular time was purely fortuitous.[6] We do not suggest that this factor alone is decisive; but it does, we think, dramatically confirm the evidence in the record which indicates that combined factors of shipping, promotional, and distributional cost give brewers who have managed to obtain a place in the Wisconsin beer market substantial competitive advantages over other brewers. Had they no such advantages, how could firms like Pabst and Blatz persistently enjoy market shares in that State far larger than their national average, why would many brewers proximate to Wisconsin not sell there, and, in the face of the State's large beer surplus, how could the identity and market shares of sellers in Wisconsin remain stable and a few out-of-State brewers

[5] Thus, Pabst states (Br. 15, n. 6) that Miller's market share varied between 4.35 and 8.36 percent, neglecting to mention that the latter figure includes 3.6 percent in sales of a competing brewer (Gettelman) acquired during the period (see Brief for the U.S., Appendix B, p. 50, n. 2).

[6] Further indication that the market for beer is not national is provided by the uncontradicted evidence that the f.o.b. prices charged by Pabst and Blatz to their distributors varied from State to State (see Brief for the U.S., p. 38 and n. 25). These admitted, often wide price variations indicate that competitive pressures are not uniform or even throughout the country, suggesting that not all members of the industry can compete with equal facility in every State.

persistently enjoy substantial such shares?' On this record, the clear answer is that the existing sellers in Wisconsin have an appreciable edge over breweries not now selling there, and we believe that the government is fully justified therefore in excluding the latter in defining the relevant market.

Respectfully submitted.

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' Thus, Blatz's sales of beer in Wisconsin were consistently greater than Pabst's although the capacity of Pabst's Milwaukee brewery was substantially greater than Blatz's (R. 246).

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